87-356

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JOE BEN COLLEY, Petitioner

V.

NATIONAL BANK OF TEXAS, Respondent
and
WEST TEXAS WHOLESALE SUPPLY, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

The Petitioner JOE BEN COLLEY respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on June 8, 1987. The appeals were docketed separately in the Court of Appeals, but were resolved by the single opinion from which review is sought. Pursuant to Supreme Court Rule 19.4 this single petition for writ of certiorari seeks to review the cases of both Respondents because they involve identical legal issues at this stage of the appellate process.

QUESTION PRESENTED FOR REVIEW

The question presented is whether a court's written opinion which fails to set forth the court's judgment in a

separate document as required by Bankruptcy Rule 9021 is a "final order" for purposes of review.

LIST OF ALL PARTIES

The caption of this Petition accurately reflects all of the parties to this matter, except that the Federal Deposit Insurance Corporation (F.D.I.C.) has now assumed all the interest of the National Bank of Texas in the outcome of this case.

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OPINION BELOW

The opinion of the Court of Appeals is reported at 814 F.2d 1008 and has been reproduced in its entirety in the Appendix. The Court of Appeals opinion on the Motion for Rehearing is likewise reproduced in the Appendix. The U.S. District Court for the Western District did not render an opinion, but it did affirm the order of the U.S. Bankruptcy Court denying Colley's motions to reconsider. The orders denying reconsideration are reproduced in the Appendix, along with the two Memorandum Opinions from which Colley still seeks relief.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 17, 1987. A timely petition for rehearing was denied on June 8, 1987.

This petition for certiorari is filed within 90 days of that date (28 U.S.C. 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions, Bankruptcy Rules, and Federal Rules of Civil Procedure are involved in this case. Some of these statutory provisions are not mentioned in this petition, but are included because reference is made to them in the body of the Fifth Circuit opinion sought to be reviewed. Because of the length of reproducing these provisions, they have been included at the end of the Appendix in accordance with Supreme Court Rule 21.1(f).

11 U.S.C. 502
Allowance of Claims or Interests.

Bankruptcy Rule 3008
Reconsideration of Claims

Bankruptcy Rule 9001
General Definitions

Bankruptcy Rule 9021
Entry of Judgment; District Court Record of Judgment

Bankruptcy Rule 9023
New Trials; Amendments to Judgments

Bankruptcy Rule 9024
Relief from Judgment or Order

F.R. Civ. P. 59
New Trials; Amendments of Judgments

F.R. Civ. P. 60
Relief from Judgment or Order

STATEMENT OF THE CASE

The original basis for federal jurisdiction in the bankruptcy court was 28 U.S.C. 1471, and the December 29, 1982 order entered by the Honorable William S. Sessions entitled "Authority of Bankruptcy Court Pending Congressional Remedial Legislation." Present federal jurisdiction in the bankruptcy court is maintained under 28 U.S.C. 1334 and 28 U.S.C. 157.

This case was commenced when Joe Ben Colley filed a Chapter 13 bankruptcy in 1982. During the course of the case Colley objected to the claims of National Bank of Texas ("NBT") and West Texas Wholesale Supply ("West Texas"). Colley's objections were overruled by the bankruptcy judge and combination orders and opinions to that effect were entered on May 20, 1985.[1] (See Appendix, pgs. 33 and 53). On June 26, 1985, some 37 days later, Colley filed a motion to reconsider the allowance of the NBT claim. The motion to reconsider the allowance of the West Texas claim was filed on July 9, 1985.

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1 These two memorandum opinions were signed by the bankruptcy judge on May 16, 1985 and docketed on May 20, 1985. These two orders are always referred to in this petition as the May 20th orders, while the Fifth Circuit opinion refers to these same orders as the May 16th orders.

The bankruptcy judge denied the motion to reconsider the NBT claim on December 5, 1985 and the West Texas claim on January 30, 1986. Timely appeals were taken from the two orders denying reconsideration. The U.S. District Court affirmed both orders of the bankruptcy court without an opinion.

Thereafter, Colley appealed to the Court of Appeals for the Fifth Circuit ("Fifth Circuit"). The Fifth Circuit held that the May 20, 1985 orders had become final when no appeal therefrom was taken within 10 days. It further concluded that Colley's motions to reconsider were rightfully denied because Colley did not allege any facts which would give rise to relief from a final order under Bankruptcy Rule 9024 (F.R.C.P. 60(b). Having thus concluded this threshold issue against Colley, the

Fifth Circuit did not address the merits of the alleged errors in the allowance of the NBT or West Texas claims.

Colley argued that the May 20th orders could never be final orders because they did not meet the separate document requirement of Bankruptcy Rule 9021. Since they were not final orders, Colley urged that the Rule 60(b) standards were inapplicable, and the Fifth Circuit was free to consider the assignment of errors in the May 20th orders which were raised in the motions to reconsider. The Fifth Circuit concluded, however, that Colley had waived his right to appeal from the May 20th orders by failing to demand the entry of separate judgments by the bankruptcy court.

REASON FOR GRANTING THE WRIT

The Fifth Circuit has decided a federal question in a way which conflicts with applicable decisions of this Court. F.R. Civ. P. 58 provides that every judgment be set forth on a separate document. Bankruptcy Rule 9021 adapts Rule 58 to bankruptcy proceedings and provides that any judgment in an adversary proceeding or contested matter shall be set forth on a separate document. Bankruptcy Rule 9001 defines "judgment" as any appealable order, and a court's ruling on an objection to claim is certainly an appealable order.

There can be no doubt that the bankruptcy judge's May 20th orders did not meet the separate document requirements of Bankruptcy Rule 9021. Where the trial court has combined an opinion with findings of fact and an order, this Court has consistently held

that the appellate clock did not commence running because no separate judgment had been entered. United States v. Indrelunas, 411 U.S. 216, 93 S. Ct. 1562, 36 L.Ed.2d 202 (1973). The Indrelunas decision was modified by this Court in Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S. Ct. 1117, 55 L.Ed.2d 357 (1978) to permit the parties to proceed with their appeal rather than to have it dismissed for want of jurisdiction.

The present decision in Colley does great violence to both the Indrelunas and Bankers decisions. There can be no doubt that under both Indrelunas and Bankers that the bankruptcy judge's May 20th orders were not final judgments. Yet, the Fifth Circuit has found them to be such by requiring Colley to meet the review standards of Rule 60(b) which apply only to final judgments. The merits of Colley's appeal were never

considered by the Fifth Circuit since they concluded he could not surmount the threshold barrier imposed by Rule 60(b).

Bankers is then cited by the Fifth Circuit for the proposition than Colley has waived his right to appeal from the May 20th orders. The Fifth Circuit's conclusion is erroneous. Prior to the Bankers decision, appeals from defective orders were dismissed for want of jurisdiction because of the lack of a final order from which the appeal could be taken. The appealing party then returned to the trial court to request that a separate judgment be entered, and after its entry, then commenced the entire appellate process over again.

The Bankers decision recognized that this process was a very wasteful use of judicial time, and held that the parties had waived the separate document requirement when they had otherwise

proceeded with a timely appeal from the defective order. The waiver of the separate document requirement in the Bankers decision was a means to prevent the loss of judicial time and should not be read to effectuate the loss of the right of appeal. Yet, the Fifth Circuit has used Bankers to defeat appellate jurisdiction, and deny Colley any review on the merits of two substantial claims which have been allowed against him. Had the Fifth Circuit correctly applied the Indrelunas and Bankers decisions it should have concluded:

1. The May 20th orders were not final judgments;

2. The appellate clock did not commence running on May 20th or any date thereafter;

3. Colley's motions to reconsider the claims could best be characterized as premature motions for new trial;

4. That it would be a waste of judicial time to dismiss the appeal for want of jurisdiction because of the lack of entry of a final judgment; and

5. That the appellate court should consider the merits of the issues raised by Colley on appeal.

All of these issues having been incorrectly decided in conflict with decisions of this Court, a writ of certiorari should issue to review the opinion of the Fifth Circuit.

RESPECTFULLY SUBMITTED.

ERIC R. BORSHEIM
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Austin, Texas 78701
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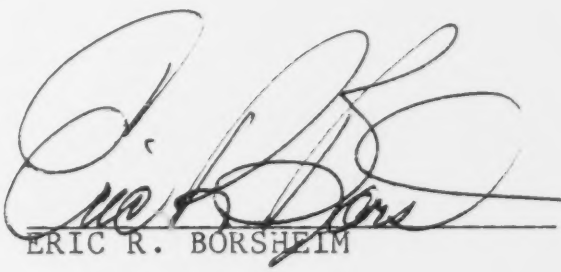
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of August, 1987, three copies of this Petition for Writ of Certiorari were mailed, first-class U.S. Mail postage prepaid, to each of the following attorneys: Weldon Ponder, 1000 Capitol Center, 919 Congress Avenue, Austin, Texas 78701, counsel for National Bank of Texas; and Don L. Baker, 812 San Antonio Street, Suite 400, Austin, Texas 78701, attorney for West Texas Wholesale Supply. I further certify that all parties required to be served have been served.



ERIC R. BORSHEIM

APPENDIX

In the Matter of Joe Ben COLLEY, Debtor.

Joe Ben COLLEY, Plaintiff-Appellant

v.

NATIONAL BANK OF TEXAS, Defendant-Appellee.

Joe Ben COLLEY, Plaintiff-Appellant

v.

WEST TEXAS WHOLESALE SUPPLY, Defendant-Appellee

Nos. 86-1625, 86-1626

United States Court of Appeals, Fifth Circuit.

April 17, 1987.

Appeals From the United States District Court for the Western District of Texas.

Before GEE, REAVLEY, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

These appeals filed by the Chapter 13 debtor challenge the district court's affirmance of a bankruptcy court order refusing to reconsider its allowance of appellees' proofs of claim in Colley's bankruptcy. The issues being identical, and the facts similar, we dispose of them together and AFFIRM.

Although old bankruptcy cases, like old soldiers, never die, we shall endeavor to put this one at rest. The disputes between these creditors and Colley originated in 1980 in a state court action against Colley and a co-debtor Cynthia McBee d/b/a Oak Hills Gun Shop to collect debts owed by them. McBee almost immediately filed a Chapter 11 bankruptcy proceeding. The creditors succeeded in winning state court judgments and orders of attachment covering real property owned by Colley on the basis that he had obtained their

money under false pretenses. Tex.Civ.Prac. & Rem.Code Sec 61.002(9) (Vernon 1986). Colley thereupon filed for Chapter 13 relief in 1982. Appellees litigated their respective lien positions on the gun shop inventory, in the McBee bankruptcy, up to the Fifth Circuit. In re McBee, 714 F.2d 1316(1983). After eventually resolving this portion of their claims in the McBee proceeding, the creditors returned to Colley's bankruptcy and asserted that the remainder of their claims were fully secured by virtue of their attachment liens. Colley objected to their proofs of claim, questioning the calculations of principal, interest and attorneys' fees asserted by each of the creditors, as well as their rights under the writs of attachment. On May 16, 1985, following a trial on the merits, the bankruptcy judge rejected Colley's

position and allowed the claims of National Bank of Texas and West Texas Wholesale Supply in full.

Rather than appeal the May 16 orders, Colley filed motions for reconsideration in July, 1985, which were heard by the bankruptcy court in November of that year. Colley's grounds for reconsideration were not materially different from those contained in his original objection to the creditors' proofs of claim,[2] and the bankruptcy court denied reconsideration. This appeal followed.

[1,2] We have jurisdiction to consider the district court's order denying reconsideration pursuant to 28 U.S.C. Sec 158(d). See In re W.F. Hurley, Inc., 612 F.2d 392 (8th Cir.1980). We

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[2] The only entirely new issue raised questioned the interest calculation by NBT and this information was available from the outset of his objection.

review the bankruptcy court's ruling on the motion to reconsider under the abuse of discretion standard. Id.

The bankruptcy court has power to reconsider the allowance or disallowance of proofs of claim "for cause". 11 U.S.C. Sec 502(j); Bankruptcy Rule 3008. As the Advisory Committee Note to Bankruptcy Rule 3008 evidences, the bankruptcy court's discretion in deciding whether to reconsider a claim is virtually plenary, as the court may decline to reconsider without a hearing or notice to the parties involved. If reconsideration is granted, the court may readjust the claim in any fashion "according to the equities of the case." 11 U.S.C. Sec 502(j).

[3,4] The court's broad discretion should not, however, encourage parties to avoid the usual rules for finality of contested matters. Bankruptcy Rule 9024

incorporates Federal Rule of Civil Procedure 60 into all matters governed by the Bankruptcy Rules except, inter alia, "The reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b)...." We interpret Rule 9024 to provide that, when a proof of claim has in fact been litigated between parties to a bankruptcy proceeding, the litigants must seek reconsideration of the bankruptcy court's determination pursuant to the usual Rule 60 standards if they elect not to pursue a timely appeal of the original order allowing or disallowing the claim. The elaboration of Section 502(j)'s requirement of "cause" for reconsideration by the Rule 60 criteria substantially eliminates the "tension with the right of an appeal from an erroneous final order." 3 Collier on

Bankruptcy (15th ed.) Paragraph 502.10 at 502-107. See also In re W.F. Hurley, Inc., supra.

[5] In this case, whether the bankruptcy court applied the test embodied in Rule 60(b) in ruling on reconsideration of appellees' claims is not clear. It is obvious that Colley did not feel himself so bound and his "Motions for Reconsideration", as noted, are almost entirely a rehash of his original objections to the claims. He did not explicitly or implicitly assert fraud, newly discovered evidence, mistake, inexcusable neglect, or any of the other matters pertinent to a Rule 60(b) motion. He did not even generally assert "cause" for reconsideration under Section 502(j). As Colley did not even get his foot in the door for purposes of

reconsideration, the district court was well within its discretion to deny that relief.[3]

AFFIRMED.

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[3] Colley argues in a supplemental brief that the judgments of the bankruptcy court allowing the claims of appellees were not embodied in a separate document as required by Federal Rule of Civil Procedure 58, and Bankruptcy Rule 9021. He therefore urges us to consider his contest of the claims on the merits. We do not agree with this contention. See InterFirst Bank Dallas v. Federal Deposit Insurance Corp., 808 F.2d 1105 (5th Cir 1987).

In the Matter of Joe Ben COLLEY, Debtor.

Joe Ben COLLEY, Plaintiff-Appellant,

v.

WEST TEXAS WHOLESALE SUPPLY
Defendant-Appellee.

Joe Ben COLLEY, Plaintiff-Appellant

v.

NATIONAL BANK OF TEXAS,
Defendant-Appellee

Nos. 86-1625, 86-1626

United States Court of Appeals,
Fifth Circuit.

June 8, 1987.

Appeals from the United States District Court for the Western District of Texas.

ON PETITIONS FOR REHEARING

AND SUGGESTION FOR

REHEARING EN BANC

(Opinion April 17, 1987, 5th Cir., 1987, 814 F.2d 1008)

Before GEE, REAVLEY, and JONES, Circuit Judges.

PER CURIAM:

In his Petitions for Rehearing, Colley again asserts that Bankruptcy Rule 9021 and Federal Rule of Civil Procedure 58 require us to consider his appeal on the merits, because the judgment of the bankruptcy court allowing the claims of West Texas Wholesale Supply and National Bank of Texas was never embodied in a separate judgment. Once more, we decline to do so.

[1] The sole purpose of the separate document rule is to definitively establish when the time for appeal begins to run. Bankers Trust Co. v. Mallis, 435 U.S. at 387, 98 S.Ct. at 1121; Hanson v. Town of Flower Mound, 679 F.2d 497, 502 (5th Cir.1982). By moving for reconsideration under Section 502(j) and

appealing to the district court and this court based on the denial of that motion, rather than seeking the entry of a separate judgment on the prior Memorandum Opinion and Order and filing a notice of appeal based on it, Colley has waived his right to a separate judgment and therefore to review on the merits of the underlying order. For us to hold otherwise would mean that Colley could now return to the bankruptcy court, demand the entry of a separate judgment, file a new notice of appeal based on it, and thus further prolong a dispute that is already over seven years old.

The petitions for rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal

Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:

JOE BEN COLLEY NO. 1-82-00188

DEBTOR CHAPTER 13

ORDER OVERRULING DEBTOR'S MOTION TO RECONSIDER ALLOWANCE OF CLAIM OF NATIONAL BANK OF TEXAS

On this date came on to be considered the Debtor's Motion to Reconsider Allowance of Claim of National Bank of Texas in the above styled and numbered case.

The Court, after reviewing the file and record, including the Motion and written response filed by counsel for the Claimant, finds that the Motion should be overruled.

It is, therefore, ORDERED that the Debtor's Motion to Reconsider Allowance of Claim, filed herein with respect to the Second Amended Proof of Claim of National Bank of Texas, should be, and the same is hereby, OVERRULED. It is further ORDERED that all relief requested in the above Motion should be, and the same is hereby, DENIED.

Signed this 2nd day of December, 1985, at San Antonio, Texas.

/s/ R. Glen Ayers
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:

JOE BEN COLLEY NO. 1-82-00188

DEBTOR CHAPTER 13

ORDER DENYING DEBTOR'S MOTION FOR RECONSIDERATION

On this date came on to be considered the Debtor's Motion for Reconsideration of the Allowance of Claim of West Texas Wholesale Supply Company filed in the above styled and numbered cause.

The Court, after reviewing the file and record of the case, the testimony adduced at the hearing on the matter held in Austin, Texas on November 8, 1985, and supplemental material supplied by Counsel for the Debtor, finds that the Allowance of Claim, as originally considered and

upheld by Judge Joseph C. Elliott for the United States Bankruptcy Court for the Western District of Texas, should stand.

In light of the foregoing, it is, therefore, ORDERED that the Debtor's Motion for Reconsideration of the Allowance of Claim of West Texas Wholesale Supply Company should be, and the same is hereby, DENIED.

Signed this 21 day of January, 1986, at San Antonio, Texas.

/s/ R. Glen Ayers
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:

JOE BEN COLLEY, NO. 1-82-00188-T-13

DEBTOR

MEMORANDUM OPINION AND ORDER OVERRULING DEBTOR'S OBJECTION TO CLAIM OF NATIONAL BANK OF TEXAS

On the 7th day of February, 1985, came before the Court for hearing, the Objection to Claim and Amended Objection to Claim, filed in this case by the Debtor, Joe Ben Colley ("Colley"), objecting to the Proofs of Claim filed by National Bank of Texas. The Debtor appeared in person and through his attorney of record, Mr. Eric R. Borsheim. The Creditor, National Bank of Texas ("NBT"), appeared through its attorney of record, Mr. B. Weldon Ponder, Jr. All matters in controversy, including both

questions of fact, and contested issues of law, were submitted to the Court for determination.

Prior to the commencement of the hearing, NBT filed its Second Amended Proof of Claim. The parties proceeded to trial, using this Second Amended Proof of Claim as the most recent statement of the NBT claim, inclusive of interest and attorney's fees to the date of the hearing, and the Court considers this Second Amended Proof of Claim as the statement of the NBT claim that is before the Court for the purposes of this Order.

The NBT claim, as stated in the Second Amended Proof of Claim, is in the amount of $52,541.27, as of the date of hearing, February 7, 1985. NBT takes the position that its claim is fully secured by a judicial lien perfected against property of the estate, prior to the commencement of this Chapter 13

proceeding, and that it is thus entitled to fully recover its attorney's fees and postpetition interest, in addition to the principal amount of its claim.

It is undisputed that in October of 1980, well over a year and a half prior to the commencement of this Chapter 13 case, NBT sued Colley in the 250th Judicial District Court of Travis County, Texas, on a promissory note executed by Colley and one Cynthia K. McBee, payable to the order of NBT. Colley's co-debtor, McBee, almost immediately filed a Chapter 11 petition in this Court (Cause No. 1-80-00383-E). Some months after filing its suit, NBT obtained an order from the State District Court, directing the Clerk of that Court to issue a writ of attachment against any non-exempt assets of Colley that could be found in the State of Texas (Colley Exhibit 2 and NBT Exhibit C). The order granting the writ

of attachment was entered by the State District Court based upon allegations made by NBT, to the effect that the subject debt was one for property obtained under false pretenses by Colley (Colley Exhibit 1). See TEX. REV. CIV. STAT. ANN. art. 275 (Vernon 1973). The writ of attachment was executed by the Constable for Precinct No. 5 of Travis County, Texas, by describing in the return thereon certain Travis County real estate owned by Colley and by recording a copy of the writ and return in the Attachment Lien Records of Travis County, Texas (Colley Exhibit 4 and NBT Exhibit "B").

Thereafter, because the automatic stay was in effect as to the co-debtor, McBee, NBT filed a Motion for Severance (Colley Exhibit 6), and an Order of Severance was signed by State District Judge on April 16, 1982, so as to permit

NBT to proceed against Colley (Colley Exhibit 8). Before the case could come to trial, Colley commenced this Chapter 13 case by filing a petition on May 12, 1982.

The parties stipulated that the principal amount of the NBT claim is substantially correct (subject to certain crediting arguments hereinafter discussed), and that the value of the Travis County real estate described in NBT's attachment lien is sufficient to cover the NBT claim, if it is secured. Colley disputes, however, the validity of the attachment lien claimed by NBT, and the amount of attorney's fees sought by NBT.

Colley's counsel complains that the writ of attachment was improperly granted by the State District Court, because the application for the writ, and the order granting the writ, failed to comply with

the requirements of Texas law. Specifically, Colley's counsel argues that the Application for Writ of Attachment (Colley Exhibit 1), and the Order Granting Writ of Attachment and Setting Bond (Colley Exhibit 2 and NBT Exhibit C), contain conclusory statements and fail to state specific facts to support the statutory grounds for issuance of the writ, as required by TEX. R. CIV. P. 592. This Court, however, finds that Texas procedure provides an adequate mechanism for litigating these issues, whenever a defendant believes that the writ has been improvidently granted. TEX. R. CIV. P. 608. The same rules require that the Plaintiff obtaining the writ serve the Defendant with notice of the writ's issuance, and of the Defendant's hearing rights. TEX. R. CIV. P. 598a. From the record, it appears that counsel for NBT complied

with the notice requirement in this case (Colley Exhibit 5). This court will not disturb the prejudgment relief granted by a State District Court pursuant to statutory authority, especially where, as here, state law provides an adequate review procedure for challenging the appropriateness of the State Court's action. In this case, nearly a year elapsed between the date the attachment was levied, and the date Colley commenced this bankruptcy proceeding, and it appears that no effort was made by Colley's counsel during that time to obtain relief from the writ under the available state court procedures.

It appearing to the Court that the writ of attachment was obtained and levied in accordance with the requirements of Texas law, the Court finds that NBT obtained a duly perfected lien against Colley's Travis County real

property, which lien is enforceable against that real property in these proceedings.

Colley argues that NBT lost its attachment lien after the commencement of these Chapter 13 proceedings, because of certain actions taken by the State District Court with respect to NBT's failure to prosecute the suit against Colley (Colley Exhibit 9 through 13). The Court finds that this argument has no merit for two reasons. First, the attachment lien was in force on the date the petition was filed initiating this case, and that is the operative date for determing [sic] the secured or unsecured status of a creditor claiming a judicial lien. Second, it appears that NBT took all reasonable steps, consistent with the prohibitions of the automatic stay, to retain its lawsuit against Colley on the active docket of the State District

Court, pending disposition of Colley's bankruptcy, and that the State District Court clearly intended to retain the case as active (Colley Exhibit 13). Any inclusion of the Colley lawsuit on any subsequent list of cases dismissed (Colley Exhibit 11) was merely a clerical error.

Colley also argues that the writ of attachment was improper because it was issued after McBee's bankruptcy proceedings were commenced, but before the Order of Severance was signed by the State District Judge (Colley Exhibit 8). Colley was not a debtor in the McBee proceedings, and cannot claim the benefit of the automatic stay in that case. NBT was free to proceed against Colley, as a co-debtor, and against his property, notwithstanding the presence of the Chapter 11 debtor, McBee, as a party in the state court lawsuit.

Next, Colley argues that he was released of liability on NBT's claim when NBT settled its Complaint to Determine Dischargeability of Debt in the McBee case (Colley Exhibits 15, 16, and 20). Colley was not a party to that adversary proceeding, and the Court finds that there is no competent evidence or legal authority to support the proposition that the settlement of that litigation constituted a release of Colley's liability. Colley offered, and the Court refused to admit, Colley Exhibit 16, which is an unsigned, undated copy of a release document. NBT's counsel testified that he had no recollection of signing such a document, and Colley, despite assistance from McBee and her bankruptcy counsel, has been unable to produce a signed copy. The Court finds that the McBee settlement did not release Colley from his liability to NBT.

There is no serious dispute as to the principal amount of the NBT claim. Colley complains generally regarding the crediting of funds as between NBT and another creditor, West Texas Wholesale Supply Company, of funds recovered from the bankruptcy estate of Colley's co-debtor, Cynthia K. McBee (Cause No. 1-80-00383-E in the United States Bankruptcy Court for the Western District of Texas, Austin Division; see Colley Exhibits 17 and 18). Colley claims that all of these funds should have been credited against the claim of NBT, in compliance with the decision of the United States Court of Appeals for the Fifth Circuit, in the McBee case, 714 F.2d 1316 (1983). Colley argues that the Fifth Circuit opinion in McBee entitled NBT to all of the inventory proceeds and that this Court improperly signed an order which distributed those proceeds in

a different fashion. The subject order of distribution, which was agreed to by the three creditors claiming competing liens against those inventory proceeds (Colley Exhibit 17), was signed by this Court on January 16, 1984, following the remand of McBee by the Fifth Circuit. Colley goes on to argue that the agreed order of distribution enabled one of the junior lien holders, West Texas Wholesale Supply Company, to recover monies in the McBee case which it could not have otherwise recovered in that case. The upshot of Colley's argument is that crediting the McBee proceeds in this fashion resulted in improperly crediting some $20,811.85 to the West Texas claim, and consequently understating the credit to NBT's claim in the same amount.

The order of January 16, 1984, in the McBee case was signed by this Court, based upon the approval of counsel for

all three of the creditors who were parties to the Fifth Circuit appeal, as well as the approval of the Trustee, Vince Taylor. The purpose of the order was to dispose of certain factual disputes which remained to be resolved after remand by the Fifth Circuit. See 714 F.2d at page 1332. These were bona fide disputes still existing between the lien creditors after the Fifth Circuit decision was handed down, and the order of January 16, 1984, was a good faith attempt by the creditors to compromise and settle those disputes and to put to rest all matters in controversy in the McBee litigation. This Court has previously ruled, by order dated June 18, 1984, in the McBee case (Colley Exhibit 18) that Colley, who was neither a creditor nor a party to the appeal in that case, had no standing to complain of the earlier agreed order.

Even if Colley were in a position to question the creditors' agreed arrangement for distributing the inventory proceeds from the McBee case, Colley has not demonstrated to this Court that he has been harmed in any material respect by this crediting arrangement. True enough, the order of January 16, 1984, results in a considerably smaller credit against the NBT claim, than if all of the inventory proceeds had been applied against that claim; what happened, though was that those same funds were instead credited against the claim of West Texas Wholesale Supply Company. If the disputed $20,811.85 had been credited instead to the claim of NBT, then the claim of West Texas Wholesale Supply Company would be that much larger. In a memorandum opinion and order of this same date, this Court has ruled that the claim of West Texas

Wholesale Supply Company is also fully secured, as to principal, interest and attorney's fees, by reason of West Texas' attachment lien against Colley's Travis County real estate. Any decrease in the NBT claim, which might result from reapplying the credits, would result in an identical increase in the secured claim of West Texas.

Colley also complains that the creditors improperly applied their recoveries from the McBee case against attorney's fees, rather than against the principal portions of their respective claims. This argument has no merit. Under Texas law, a creditor has the right, in the absence of a specific contractual requirement to the contrary, to make whatever application of payments the creditor may elect. Peden v. Carpenter, 516 S.W.2d 19 (Tex. Civ. App. -Amarillo 1974, no writ). Applying

proceeds of collateral, first to attorney's fees and then against the principal indebtedness, is also in accord with the requirements of the Uniform Commercial Code, TEX. BUS. & COM. CODE ANN. Sec 9.504(a)(1) and (2)(Tex. UCC)(Vernon Supp. 1985).

Based upon the evidence and the stipulations of the parties, the Court finds that the attachment lien of NBT Texas [sic] attached to the following described real property, owned by Colley, and located in Travis County:

Lot 2-C, Leudecke re-subdivision of Lot 2-B, an addition to the City of Austin, Travis County, Texas, according to the map or plat thereof recorded in Book 42, Page 8, plat records of Travis County, Texas, and being known by local street address as 2127 Goodrich, Austin, Texas.

The Court further finds that the value of the above described property is greater than the amount of all claims

secured by liens against such property, including the contractual first lien of First Federal Savings and Loan Association, and the attachment liens of NBT and West Texas Wholesale Supply Company. The Court further finds that the value of the above described property is also sufficient to cover the attorney's fees and interest awarded by this order, as well as any additional interest that may accrue on such claims between the date of hearing (February 7, 1985) and the date such claims are paid in full.

The Court has reviewed the Affidavit in Support of Claim for Attorney's Fees, executed by NBT's counsel, B. Weldon Ponder, Jr., regarding the attorney's fees claimed by NBT (NBT Exhibit A). THe Court finds that the fees claimed by NBT are reasonable in relation to the services performed, and that the services

performed were reasonable and necessary to protect the intersts [sic] of NBT in connection with its claim. The Court further finds that the information advanced by NBT in support of its claim for attorney's fees complies with the requirements of the United States Court of Appeals for the Fifth Circuit in the matter of First Colonial Corporation of America, 544 F.2d 1291 (1977). The Court further finds that in the event an appeal is taken by Colley in connection with this order, a reasonable additional fee for the services of NBT's counsel, for defending the appeal in the United States District Court, would be $2,500.00, that a reasonable fee for defending or prosecuting an appeal in the United States Court of Appeals would be an additional $2,500.00, and that a reasonable fee for defending or filing an appeal or application for writ of

certiorari to the United States Supreme Court would be an additional $2,500.00. The Court further finds that the calculation of interest, as set forth in the Second Amended Proof of Claim of NBT, is correct, and that all credits against the claim have been allowed.

It is therefore ORDERED, ADJUDGED and DECREED that the claim of National Bank of Texas be, and it is hereby, allowed as a fully secured claim in the amount of $52,541.27, together with interest at the rate of seventeen per cent [sic] (17%) per annum on the principal portion of such amount ($27,785.67) from and after February 7, 1985, until paid. It is further ORDERED that NBT shall be allowed an additional $2,500.00 attorney's fees in the event an appeal is taken from this order by Colley to the United States District Court or to the United States Court of Appeals, an

additional $2,500.00 attorney's fees if an appeal is taken by any party to the United States Court of Appeals from the decision of the United States District Court, and an additional $2,500.00 in attorney's fees if any party seeks review, by way of appeal or application for writ of to the United States Supreme Court, of the decision of the United States Court of Appeals.

Signed this the 16th day of May, 1985. (Docketed May 20, 1985)

/s/ Joseph C. Elliott
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IN RE:

JOE BEN COLLEY, NO. 1-82-00188-T-13

DEBTOR

MEMORANDUM OPINION AND ORDER OVERRULING DEBTOR'S OBJECTION TO CLAIM OF WEST TEXAS WHOLESALE SUPPLY COMPANY

On the 7th day of February, 1985, came before the Court for hearing, the Objection to Claim and Amended Objection to Claim, filed in this case by the Debtor, Joe Ben Colley ("Colley"), objecting to the Proofs of Claim filed by West Texas Wholesale Supply Company. The Debtor appeared in person and through his attorney of record, Mr. Eric R. Borsheim. The Creditor, West Texas Wholesale Supply Company ("West Texas"), appeared through its attorney of record, Mr. Don L. Baker. All matters in controversy,

including both questions of fact, and contested issues of law, were submitted to the Court for determination.

Prior to the commencement of the hearing, West Texas filed its First Amended Proof of Claim. The parties proceeded to trial, using this First Amended Proof of Claim as the most recent statement of the West Texas claim, inclusive of interest and attorney's fees to the date of the hearing, and the Court considers this First Amended Proof of Claim as the statement of the West Texas claim that is before the Court for the purposes of this Order.

The West Texas claim, as stated in the First Amended Proof of Claim, is in the amount of $40,072.65, as of the date of hearing, February 7, 1985. West Texas takes the position that its claim is fully secured by certain judicial liens perfected against property of the estate,

prior to the commencement of this Chapter 13 proceeding, and that it is thus entitled to fully recover its attorney's fees and post-petition interest, in addition to the principal amount of its claim.

It is undisputed that in November of 1980, well over a year prior to the commencement of this Chapter 13 case, West Texas sued Colley in the 250th Judicial District Court of Travis County, Texas, on an open account maintained by Colley with West Texas, in connection with a business formerly owned by Colley known as the "Oak Hill Gun Shop." Shortly after filing its suit, West Texas obtained an order from the State District Court, directing the Clerk of that Court to issue a writ of attachment against any non-exempt assets of Colley that could be found in the State of Texas (Colley Exhibit 3). The order granting the writ

of attachment was entered by the State District Court based upon allegations made by West Texas, to the effect that the subject debt was one for property obtained under false pretenses by Colley (Colley Exhibit 1). See TEX. REV. CIV. STAT. ANN. art. 275 (1973). The Sheriff of Williamson County, Texas, executed the writ by describing in the return thereon certain real property owned (or believed to be owned) by Colley, and by recording copies of the writ and return in the Attachment Lien Records of Williamson and Travis Counties (Colley Exhibit 4). Thereafter, on May 3, 1982, following arguments by Colley's attorney that the first writ was defective (Colley Exhibit 6), a second writ of attachment was issued by the District Clerk of Travis County, Texas, pursuant to a second court order of the same date, based upon similar fraud allegations by West Texas

(Colley Exhibits 7, 9 and 10). This second writ of attachment was executed by the Constable for Precinct No. 5 of Travis County, Texas, by recording same with the County Clerk of Travis County, Texas, and by including in the return thereon, a description of the Travis County real estate owned by Colley (Colley Exhibit 10). In the meantime, West Texas had proceeded to a jury trial on its lawsuit against Colley, and had obtained a jury verdict agianst Colley for the unpaid principal amount of the open account of $13,574.00, $4,000.00 in exemplary damages and $9,255.00 in attorney's fees (Colley Exhibit 5). Before the jury verdict could be reduced to a written judgment of the State District Court, Colley commenced this Chapter 13 case by filing a petition on May 12, 1982.

The parties also stipulated that the principal amount of the West Texas claim is substantially correct (subject to certain crediting arguments hereinafter discussed), and that the value of the Travis County real estate described in West Texas' attachment lien is sufficient to cover the West Texas claim, if it is secured. Colley disputes, however, the validity of the attachment liens claimed by West Texas, and the amount of attorney's fees sought by West Texas.

Colley's counsel complains that the writs of attachment were improperly granted by the State District Court, because the applications for the writs, and the orders granting them, failed to comply with the requirements of Texas law. Specifically, Colley's counsel argues that, in connection with each of the two writs of attachment obtained by West Texas, the Application for Writ of

Attachment (Colley Exhibits 1 and 7), and the Order Granting Writ of Attachment and Setting Bond (Colley Exhibits 3 and 9), contain conclusory statements and fail to state specific facts to support the statutory grounds for issuance of the writ, as required by TEX. R. CIV. P. 592. This Court, however, finds that Texas procedure provides an adequate mechanism for litigating these issues, whenever a defendant believes that the writ has been improvidently granted. TEX. R. CIV. P. 608. The same rules require that the Plaintiff obtaining the writ serve the Defendant with notice of the writ's issuance, and of the Defendant's hearing rights. TEX. R. CIV. P. 598a. From the record, it appears that counsel for West Texas complied with the notice requirement in this case (Colley Exhibit 8). This court will not disturb the prejudgment relief granted by a State

District Court pursuant to statutory authority, especially where, as here, state law provides an adequate review procedure for challenging the appropriateness of the State Court's action. In this case, more than a year elapsed between the date the first attachment was levied, and the date Colley commenced this bankruptcy proceeding, and it appears that no effort was made by Colley's counsel during that time to obtain relief from the writ under the available state court procedures. Moreover, the parties had proceeded to trial on the merits of West Texas' cause of action, and the State Court jury had returned findings of fact entitling West Texas to final judgment on its monetary claim and lien.

Colley's counsel next argues that the first writ of attachment did not create a lien on Colley's real estate

located in Travis County, because it was improperly levied by the Sheriff of Williamson County. It appears from the testimony that counsel for West Texas forwarded the writ to the Williamson County Sheriff for the purpose of levying on two tracts of real estate which he believed Colley owned in Williamson County, and on the one tract owned by Colley in Travis County. In fact, Colley had disposed of the two tracts in Williamson County, and owned no interest in them at the time the levy was made, but in fact still owns the Travis County tract. Nevertheless, the Williamson County Sheriff proceeded to execute the writ by including both the Williamson County tracts and the Travis County tract in his return and by recording the executed writ in the Attachment Lien Records for both Williamson and Travis Counties. As required by the Texas

rules, the writ in question was directed "To the Sheriff or any Constable of any county of the State of Texas..." The levy of the writ on the two Williamson County tracts obviously had no effect, since Colley no longer owned that property. The Williamson County Sheriff's levy on the Travis County tract was nevertheless appropriate, in light of the directive, "To the Sheriff...of any county..." Furthermore, any procedural deficiency in the execution of the first writ of attachment was cured by the second writ, which was executed by a constable in Travis County, on May 3, 1982 (Colley Exhibit 10).

Colley's counsel argues that the second writ, issued and executed on May 3, 1982, was a preferential transfer under 11 U.S.C. Section 547. It does not appear that Colley has ever complained on such, by way of adversary proceeding, as

is required by Rule 7001, Rules of Bankruptcy Procedure. Furthermore, to constitute a preference under Section 547, the transfer must have been made while the debtor was insolvent, and must enable the creditor to receive more than the creditor would have received in a Chapter 7 liquidation case, had the transfer not been made. 11 U.S.C. Section 547(b)(3) and (5). Even if Colley's preference argument had properly been litigated in an adversary proceeding, it does not appear that he could have proven these elements of a preference action, since it appears to the Court from the schedules on file in this case and from the testimony of Mr. Colley himself, that the value of property owned by the estate exceeds the amount of allowed claims against the estate.

There is no serious dispute as to the principal amount of the West Texas claim. Colley complains generally regarding the crediting of funds as between West Texas and another creditor, National Bank of Texas, of funds recovered from the bankruptcy estate of Colley's co-debtor, Cynthia K. McBee (Cause No. 1-80-00383-E in the United States Bankruptcy Court for the Western District of Texas, Austin Division; see Colley Exhibits 12 and 13). Colley claims that all of these funds should have been credited against the claim of National Bank of Texas, in compliance with the decision of the United States Court of Appeals for the Fifth Circuit, in the McBee case, 714 F.2d 1316 (1983). It is obvious, however, that the allocation of these funds between the two creditors, pursuant to an agreed order of the McBee creditors following remand

(Colley Exhibit 12), has resulted in a substantial credit against the West Texas claim in this case, and it is incongruous for Colley to argue that he has been adversely affected by the crediting arrangement, at least insofar as the West Texas claim is concerned. The crediting issue is more fully discussed in a memorandum opinion and order of this Court signed this same date, overruling the Debtor's objection to the claim of National Bank of Texas.

Based upon the evidence and the stipulations of the parties, the Court finds that the attachment lien of West Texas attached to the following described real property, owned by Colley, and located in Travis County:

Lot 2-C, Leudecke re-subdivision of Lot 2-B, an addition to the City of Austin, Travis County, Texas, according to the map or plat thereof recorded in Book 42, Page 8, plat records of Travis

County, Texas, and being known by local street address as 2127 Goodrich, Austin, Texas.

The Court further finds that the value of the above described property is greater than the amount of all claims secured by liens against such property, including the contractual first lien of First Federal Savings and Loan Association, and the attachment liens of West Texas and of National Bank of Texas. The Court further finds that the value of the above described property is also sufficient to cover the attorney's fees and interest awarded by this order, as well as any additional interest that may accrue on such claims between the date of hearing (February 7, 1985) and the date such claims are paid in full.

The Court has reviewed the Written Summary of Testimony of West Texas' counsel, Don L. Baker, regarding the attorney's fees claimed by West Texas

(West Texas Exhibit A). The Court finds that the fees claimed by West Texas are reasonable in relation to the services performed, and that the services performed were reasonable and necessary to protect the intersts [sic] of West Texas in connection with its claim. The Court further finds that the information advanced by West Texas in support of its claim for attorney's fees complies with the requirements of the United States Court of Appeals for the Fifth Circuit in the matter of First Colonial Corporation of America, 544 F.2d 1291 (1977). The Court further finds that in the event an appeal is taken by Colley in connection with this order, a reasonable additional fee for the services of West Texas' counsel, for defending the appeal in the United States District Court, would be $2,500.00, that a reasonable fee for defending or prosecuting an appeal in the

United States Court of Appeals would be an additional $2,500.00, and that a reasonable fee for defending or filing an appeal or application for writ of certiorari to the United States Supreme Court would be an additional $2,500.00. The Court further finds that the calculation of interest, as set forth in the First Amended Proof of Claim of West Texas, is correct, and that all credits against the claim have been allowed.

It is therefore ORDERED, ADJUDGED and DECREED that the claim of West Texas Wholesale Supply Company be, and it is hereby, allowed as a fully secured claim in the amount of $40,072.65, together with interest at the rate of ten per cent per annum on the principal portion of such amount ($13,574.00) from and after February 7, 1985, until paid. It is further ORDERED that West Texas shall be allowed an additional $2,500.00

attorney's fees in the event an appeal is taken from this order by Colley to the United States District Court or to the United States Court of Appeals, an additional $2,500.00 attorney's fees if an appeal is taken by any party to the United States Court of Appeals from the decision of the United States District Court, and an additional $2,500.00 in attorney's fees if any party seeks review, by way of appeal or application for writ of certiorari to the United States Supreme Court, of the decision of the United States Court of Appeals.

It is further ORDERED that the claim of West Texas shall be subject to further amendment by West Texas and to further review by this Court, in the event Colley should prevail in any appeal of this Court's opinion and order of this same date, overruling Colley's objection to claim of National Bank of Texas, insofar

as such opinion and order pertains to the crediting of claims as between West Texas and National Bank of Texas.

SIGNED this the 16 day of May, 1985.

(Docketed May 20, 1985)

/s/ Joseph C. Elliott
Bankruptcy Judge

STATUTORY PROVISIONS INVOLVED

11 U.S.C. 502.

Allowance of claims or interests.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities in the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim

proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

Bankruptcy Rule 3008

Reconsideration of Claims

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The Court after a hearing on notice shall enter an appropriate order.

Bankruptcy Rule 9001

General Definitions

The definitions of words and phrases in [sections] 101, 902 and 1101 and the rules of construction in [section] 102 of the Code govern their use in these rules. In addition, the following words and

phrases used in these rules have the meanings indicated:

(7) "Judgment" means any appealable order.

Bankruptcy Rule 9021

Entry of Judgment; District Court Record of Judgment

(a) Original Entry of Judgment of Bankruptcy Court. Subject to the provisions of Rule 54(b) F. R. Civ. P: (1) on a general verdict of a jury, or on a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment without waiting any direction by the court; (2) on a decision by the court granting other relief, or on

a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided by Rule 5003. Entry of the judgment shall not be delayed for the taxing of costs.

Bankruptcy Rule 9023

New Trials; Amendments of Judgments

Rule 59 F. R. Civ. P. applies in cases under the Code, except as provided in Rule 3008.

Bankruptcy Rule 9024

Relief from Judgment or Order

Rule 60 F. R. Civ. P. applies in

cases under the Code, except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by section 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by section 1144 or section 1330.

F.R. Civ. P. 59

New Trial; Amendments of Judgments

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which

new trial have heretofore been granted in action at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

F.R. Civ. P. 60

Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment

shall be by motion as prescribed in these rules or by an independent action.

Supreme Court, U.S.
FILED
SEP 19 1987
JOSEPH F. SPANIOL, CLERK

No. 87-356

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JOE BEN COLLEY, PETITIONER

V.

NATIONAL BANK OF TEXAS, RESPONDENT
AND
WEST TEXAS WHOLESALE SUPPLY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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JOINDER OF CASES AND PARTIES

In Petitioner's opening statement on the first page of his petition, he seeks review of two separate opinions of the Court of Appeals. Respondents herein have no objection to such joinder, believing it to be appropriate in view of the identity of legal issues.

QUESTION PRESENTED FOR REVIEW

Petitioner has asserted that the question is whether the Memorandum Opinion and Order prepared by the United States Bankruptcy Judge conformed to Bankruptcy Rule 9021 providing for the judgment to be written on a separate documents from a written opinion. That is not really the issue here. Unquestionably, the rule contemplates two separate documents. The issue here is whether Petitioner may maintain an appeal on such ground in the face of the fact

finding of the courts below that the parties all waived any such objection to any such defect. However, this question need not even be reached since the appeals in these cases were not taken from such combined Memorandum Opinion and Order, but rather were appeals taken from two separate Orders denying Motions for Reconsideration, each of which orders fully met the separate document requirement of Bankruptcy Rule 9021.

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OPINIONS OF COURT OF APPEALS

The primary opinion of the Court of Appeals is accurately reproduced in the Appendix to Petitioner's Brief. However, the opinion of the Court of Appeals on Motion for Rehearing is not accurately reproduced, omitting significant parts. A true copy of the opinion on Motion for Rehearing is appended hereto.

STATEMENT OF THE CASE

Petitioner's statement is mostly correct, until he gets to his interpretation of the opinions of the Court of Appeals for the 5th Circuit.

Petitioner mistakenly argues that the Court of Appeals operated on the premise that the Memorandum Opinion and Order of May, 1985 was the only document from which appeal was taken. As is clear from the opinions of the Court of Appeals, that Court recognized that these appeals were taken from the Orders denying Petitioner's Motions for Reconsideration. The Court of Appeals simply recognized in its opinions that even if there had been an appeal from the May, 1985 Memorandum Opinion and Order rather than from the Orders denying Motions for Reconsideration, the result would have been the same.

REASONS TO DENY PETITION FOR WRIT OF CERTIORARI

Petitioner's sole allegation is that Certiorari should be granted because the Bankruptcy Court rendered a joint Memorandum Opinion and Order in May, 1985 which failed to comply with the separate document requirement of Bankruptcy Rule 9021. There is no doubt that the joint opinion and order did fail to comply with that rule. There are, however, two independent reasons why such is not determinative of any issue between the parties at this time and why that defect is not before the Court for adjudication:

1. The actual appeals were from two Orders denying Motions for Reconsideration entered on December 5, 1985 and January 20, 1986. These orders were final orders which met the separate document requirement.

2. Even if Colley had taken an appeal from the original Memorandum Opinion and Order of the U.S. Bankruptcy Court, he waived the separate document requirement and may not now rely upon it.

The Bankruptcy Judge denied Colley's Motion To Reconsider the National Bank of Texas claim on December 5, 1985. The Bankruptcy Judge denied the Motion to Reconsider the claim of West Texas Wholesale Supply on January 30, 1986. These dates and events are confirmed on page 9 of Petitioner's Brief. These orders and denials clearly met the requirement of Bankruptcy Rule 9021 that "Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document." These are the only orders from which any appeal was ever taken. These were affirmed without opinion by the District Court.

These were affirmed by the Court of Appeals which held that the District Court operated properly within its discretion to deny reconsideration and that Colley, as Petitioner, had not adequately raised proper grounds for reconsideration. The further holdings and ruling are contained in the Opinion of the Court below which is part of the Appendix. Recognition of these uncontested procedural historical facts should be sufficient to completely dispose of this appeal and require refusal of Certiorari.

The second and independent reason why there can be no Certiorari in this case is that even if the appeal had been taken from the original combined opinion and order of the Bankruptcy Court, no party ever objected to the failure of that Court to put the opinion on a sep rate page from the order. This waiver and

failure to object is apparent on the face of the record, as expressly determined by the Court of Appeals for the reasons set forth in its opinion on Motion For Rehearing, copy of which is appended hereto.

Petitioner appears to misread the opinion of the court below and to also misread the opinion of this Court in Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct 1117, 55 L.Ed.2d 351 (1978). The opinion of the Court of Appeals shows a holding that by moving for reconsideration and subsequently appealing on that denial, rather than requesting that the Bankruptcy Court enter a separate entry of a separate judgment on the original Memorandum Opinion and Order, Colley waived his right to obtain a separate judgment. That factual determination of waiver, based upon the record in the case, is

final. The opinion of the Honorable United States Supreme Court in Mallis, makes quite plain that parties can waive the procedural requirement of the "separate document" rule. The Mallis opinion also indicates that in a case where the trial judge intends the opinion and order to be the final decision and the parties do not object that such lack of objection amounts to a waiver. That clearly is the situation in the case now before this Court. In such cases, it is clearly proper for the appellate court to rule on the merits despite the lack of a separate judgment. Diamond v. McKenzie, 770 F2d 225 (D.C.Cir. 1985). Accord, Hanson v. Town of Flower Mound, 679 F2d 497 (5th Cir. 1982).

A reading of the Memorandum Opinion and Order of the Bankruptcy Court makes it abundantly clear that the Judge

intended it to be a final judgment. No party objected. All parties acquiesced and none requested any separate judgment. Petitioner Colley treated it as a final judgment by filing Motions for Reconsideration.

CONCLUSION

Whether the appeal is considered to be from the adverse rulings on the Motions for Reconsideration or from the original Memorandum Opinion and Order, the result is the same. The Court of Appeals has correctly held that there can be no further appeal. Certiorari should be DENIED.

RESPECTFULLY SUBMITTED.

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BY: Don L. Baker
DON L. BAKER

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of September, 1987, three copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari were mailed, First-Class U.S. Mail postage prepaid, to each of the following attorneys: B. Weldon Ponder, Jr., 1000 Capitol Center, 919 Congress Avenue, Austin, Texas 78701, counsel for National Bank of Texas; and Eric R. Borsheim, 910 West Avenue, Austin, Texas 78701, counsel for Petitioner. I further certify that all parties required to be served have been served.

Don L. Baker

DON L. BAKER

In the Matter of Joe Ben COLLEY, Debtor.

Joe Ben COLLEY, Plaintiff-Appellant,

v.

WEST TEXAS WHOLESALE SUPPLY, Defendant-Appellee.

In the Matter of Joe Ben COLLEY, Debtor.

Joe Ben COLLEY, Plaintiff-Appellant,

v.

NATIONAL BANK OF TEXAS, Defendant-Appellee.

Nos. 86-1625, 86-1626.

United States Court of Appeals, Fifth Circuit.

June 8, 1987.

Debtor moved for reconsideration of bankruptcy court order allowing certain creditors' claims. The Bankruptcy Court denied motion. Debtor appealed. The United States District Court, Western District of Texas, James R. Nowlin, J., affirmed. Debtor appealed. The Court of Appeals, 814 F.2d 1008, affirmed. Debtor petitioned for rehearing. The Court of Appeals held that by moving for reconsideration and appealing based on denial of the reconsideration motion, debtor waived his right to separate judgment, and thus, to review on the merits of underlying order allowing the claims.

Petitions denied.

1. Bankruptcy ⇐11(3)

Sole purpose of bankruptcy rule requiring that every judgment be set forth on separate document is to definitively establish when time for appeal begins to run. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.; Rules Bankr.Proc.Rule 9021, 11 U.S.C.A.

2. Bankruptcy ⇐11(3)

Bankruptcy rule requiring that every judgment be set forth on separate document can be waived. Fed.Rules Civ.Proc. Rule 58, 28 U.S.C.A.; Rules Bankr.Proc. Rule 9021, 11 U.S.C.A.

3. Bankruptcy ⇐442

Debtor, who moved for reconsideration of bankruptcy court order allowing certain creditors' claims, who did not seek entry of separate judgment on the order nor file notice of appeal based on separate judgment, but who based his appeal to the District Court and the Court of Appeals on denial of his motion for reconsideration, waived his right to separate judgment, and thus, to review on the merits of the underlying order. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.; Rules Bankr.Proc.Rule 9021, 11 U.S.C.A.

Appeals from the United States District Court for the Western District of Texas.

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 17, 1987, 5th Cir., 1987, 814 F.2d 1008)

Before GEE, REAVLEY, and JONES, Circuit Judges.

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PER CURIAM:

In his Petitions for Rehearing, Colley again asserts that Bankruptcy Rule 9021 and Federal Rule of Civil Procedure 58 require us to consider his appeal on the merits, because the judgment of the bankruptcy court allowing the claims of West Texas Wholesale Supply and National Bank of Texas was never embodied in a separate judgment. Once more, we decline to do so.

[1] The sole purpose of the separate document rule is to definitively establish when the time for appeal begins to run. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385, 98 S.Ct. 1117, 1120, 55 L.Ed.2d 357 (1978). No such issue of timeliness exists in this case. Colley could have asked for the entry of a separate judgment in the bankruptcy court and filed an appeal from that judgment within 30 days. Instead, he chose to move for 11 U.S.C. § 502(j) reconsideration by the bankruptcy court, and has based his appeal to the district court and now this court on the denial of that motion. Both our opinion and that of the district court are framed in terms of this denial of reconsideration. It was not until shortly before oral argument that Colley, in a supplemental brief to this court, decided that his appeal was really on the merits of the underlying bankruptcy court order.

[2, 3] It is clear that the separate document requirement can be waived. *Bankers Trust Co. v. Mallis*, 435 U.S. at 387, 98 S.Ct. at 1121; *Hanson v. Town of Flower Mound*, 679 F.2d 497, 502 (5th Cir.1982). By moving for reconsideration under § 502(j) and appealing to the district court and this court based on the denial of that motion, rather than seeking the entry of a separate judgment on the prior Memorandum Opinion and Order and filing a notice of appeal based on it, Colley has waived his right to a separate judgment and therefore to review on the merits of the underlying order. For us to hold otherwise would mean that Colley could now return to the bankruptcy court, demand the entry of a separate judgment, file a new notice of appeal based on it, and thus further prolong a dispute that is already over seven years old.

The petitions for rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

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